

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN DAVID MAY**

Claimant

VS.

**CONNIE MAY FLOOR COVERING**

Respondent

AND

**LIBERTY MUTUAL INS. CO.**

Insurance Carrier

Docket No. 1,020,794

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the July 9, 2007, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on October 9, 2007. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was not permanently totally disabled. The ALJ further found that the opinions of Dr. John Yost and Dr. Edward Prostic were equally credible and held that claimant had a 25 percent permanent partial impairment to the right upper extremity at the level of the shoulder and a 12.5 percent permanent partial impairment to the left upper extremity at the level of the shoulder. The ALJ also found that respondent did not sustain its burden of proving preexisting impairment according to the *AMA Guides*<sup>1</sup> for either shoulder, as required by K.S.A. 2006 Supp. 44-501(c). The ALJ noted that the *AMA Guides* did not exist in 1992 but, nevertheless, held the respondent is not entitled to a credit for claimant's alleged preexisting impairment.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The Board has considered the record and adopted the stipulations listed in the Award.

### **ISSUES**

Respondent requests review of the ALJ's findings regarding the nature and extent of claimant's disability. Specifically, respondent argues that it is entitled to a credit for claimant's preexisting impairment of his left shoulder caused by a work-related injury in 1992. Respondent argues that claimant's preexisting impairment to his left shoulder was rated as 10 percent in May 1993 and was based on the requirements of the law in effect at that time. Accordingly, respondent argues claimant's preexisting impairment was established by competent medical evidence. Respondent further requests that the Board adopt the impairment rating of Dr. Yost of 10 percent permanent partial impairment to the left upper extremity, which, after the credit, would establish that claimant had a 0 percent impairment from the new injury to his left shoulder. Respondent also requests the Board adopt the impairment rating of Dr. Yost of 20 percent permanent partial impairment to claimant's right upper extremity.

Claimant argues that his left shoulder injury was a new and distinct work injury and, as such, K.S.A. 44-501(c) does not apply and respondent is not entitled to a credit for his preexisting impairment. Claimant also argues that no evidence was presented in this case that he had aggravated a preexisting condition and no evidence of any reference to the *AMA Guides* regarding claimant's prior injury. Accordingly, claimant requests the Board affirm the ALJ's Award.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability to his right and left upper extremities?

(2) Is respondent entitled to a credit for any preexisting impairment to either claimant's right or left upper extremity?

### **FINDINGS OF FACT**

Claimant is 48 years old and is married to the owner of respondent, a commercial flooring, carpet and tile business. He is head installer at respondent. On February 4, 2003, he was removing carpet from a floor using pullers. He was being helped by his stepson, who was operating a machine that undercuts carpet and loosens glue. Claimant was leaning back, putting his whole body into pulling up the carpet. At the same time, his stepson was operating the machine. Claimant heard a pop, felt something give way, and felt pain in both shoulders.

Claimant was provided medical care by respondent. He was first seen by Dr. Rodney Odgers, a family physician, who referred him to Dr. David King, an orthopedic surgeon. Dr. King operated on claimant's right shoulder on May 6, 2003. Claimant got an infection in his right shoulder after the surgery. He was sent to the emergency room at Mt. Carmel Medical Center, at which time Dr. John Yost took over his care. On June 13, 2003, Dr. Yost performed a second surgery on claimant's right shoulder. Claimant again got an infection, and Dr. Yost performed a third operation on claimant's right shoulder. Claimant also saw Dr. Yost for problems with his left shoulder, for which he was sent to physical therapy. Dr. Yost suggested surgery on claimant's left shoulder, but claimant declined the surgery because of some unrelated health problems and because of the problems he endured with his right shoulder surgeries.

Claimant now has pain in both shoulders all the time, the right being worse than the left, which worsens with activity. He has weakness in his arms. He can move his arms for only a limited period of time. Claimant was off work for several months after his injury. He has returned to work but is limited to mostly clean-up work such as sweeping and scraping with a small scraper. He cannot carry rolls of carpet, boxes of tile, or the containers of glue.

Claimant had a previous injury to his right shoulder approximately 20 years ago when he was 17 or 18 years old. The doctors put a screw into the bone, and his right shoulder has been fine since. He also had a previous workers compensation claim for an injury to his left shoulder and left little finger that happened on May 7, 1992, when he stepped into a hole and a roll of vinyl fell on him. He did not require surgery for that left shoulder injury but was treated with physical therapy and ice. After the therapy and ice, claimant's shoulder returned to normal, and he did not have problems with the left shoulder after that. On August 2, 1993, claimant settled that workers compensation case for approximately a 10 percent permanent partial general disability to the body as a whole. The medical exhibit attached to the settlement hearing contained a left upper extremity rating of "10% permanent partial disability left upper extremity at shoulder—residual [of a] clavicle fracture, rotator cuff tear" and a "1 percent permanent partial disability left upper extremity at hand—residual fracture distal phalanx of little finger."<sup>2</sup>

Dr. John Yost, a board certified orthopedic surgeon, first saw claimant for his shoulder complaints on June 12, 2003. The last time he saw claimant for shoulder complaints was February 1, 2006. His final diagnosis with regard to claimant's right shoulder was torn rotator cuff, arthritis right shoulder. That diagnosis was sustained as a result of claimant's February 4, 2003, work-related injury. Dr. Yost's diagnosis with regard to claimant's left shoulder was partial rotator cuff tear, which was also sustained as a result of claimant's February 4, 2003, work-related injury.

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<sup>2</sup> Submittal Brief of Respondent and its Insurance Carrier Liberty Mutual Insurance Company, Ex. A at 12, filed June 25, 2007.

Claimant gave Dr. Yost a history of having a significant right shoulder injury which required reconstruction when he was 18 years old, although claimant could not remember what his diagnosis was. Claimant stated he was having no problems until his recent problems with his right shoulder when he injured it pulling on carpet at work. Dr. Yost could not give an opinion as to whether claimant had any impairment from that previous accident. Dr. Yost had no recollection of claimant telling him about a previous left shoulder injury.

Using the *AMA Guides*, Dr. Yost opined that claimant has a 20 percent functional impairment to his right shoulder and a 10 percent impairment to his left shoulder. These ratings take into account the previous two injuries. Dr. Yost believes that in the future claimant will require a right shoulder replacement.

Dr. Edward Prostic, a board certified orthopedic surgeon, saw claimant on March 18, 2005, at the request of claimant's attorney. Claimant gave a history of his injury and treatment. He complained that he continues to have more difficulty with his right shoulder than his left. Claimant stated he continues to have some clicking on the right and popping and catching on his left. Dr. Prostic saw claimant again on October 16, 2006. Claimant continued to complain of pain at both shoulders, right more than left. He had restriction of motion, right more than left. He had weakness and popping in both shoulders.

Dr. Prostic diagnosed claimant with postoperative rotator cuff repair on the right, with a postoperative infection. He believed that claimant was in the early stages of osteoarthritis with restricted motion, weakness, and status post excision of the lateral clavicle. On the left, Dr. Prostic opined that claimant had evidence of rotator cuff tendinitis with weakness and restricted motion.

Dr. Prostic was of the opinion that claimant's injuries were caused or permanently aggravated by claimant's work injury on February 4, 2003. Based on the *AMA Guides*, he has rated claimant as having a 30 percent permanent partial impairment of the right upper extremity and a 15 percent permanent partial impairment of the left upper extremity, which combined and converted to a 25 percent permanent partial impairment to the body as a whole. He recommended that claimant not be assigned duties that would require lifting weights greater than 30 pounds to waist height or 14 pounds to shoulder height occasionally. Claimant should perform few, if any, activities above shoulder height.

Dr. Prostic found no reason to conclude that claimant had any preexisting impairment to his right or left shoulder. Claimant had a prior arthroplasty of his right shoulder, but he told Dr. Prostic that he had regained full motion and full strength. Claimant also had an old fracture to the left clavicle. Dr. Prostic said that to his knowledge, claimant did not have loss of motion or loss of strength, or neurologic deficit or instability to his left shoulder before his work injury of February 4, 2003.

**PRINCIPLES OF LAW**

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>3</sup>

Consequently, by definition, the Act requires that preexisting functional impairment be established by competent medical evidence and rateable under the appropriate edition

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<sup>3</sup>K.S.A. 2006 Supp. 44-501(c).

of the *AMA Guides*, if the condition is addressed by those Guides. The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a rateable functional impairment at the time of the new injury. Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 2006 Supp. 44-501(c) reduction.<sup>4</sup>

### ANALYSIS AND CONCLUSION

Claimant suffered permanent impairment to both his right and left shoulders as a result of his February 4, 2003, accident at work. His percentage of impairment for each shoulder was rated per the *AMA Guides* by two qualified medical experts, both board certified orthopedic surgeons. The Board agrees with the ALJ that the opinions of both physicians were credible and it is appropriate in this case to average the ratings.

Respondent has the burden to prove claimant's percentage of preexisting impairment. Just as the present functional impairment ratings must be determined pursuant to the *AMA Guides*, 4th edition, so must the preexisting impairment. No physician has given an opinion that claimant had a rateable impairment under the 4th edition of the *AMA Guides* before his injury of February 4, 2003. Accordingly, respondent has failed to meet his burden of proof, and no credit can be given.<sup>5</sup>

The ALJ's Award contains detailed findings of fact and conclusions of law that are accurate and supported by the record. The Board adopts those findings and conclusions as its own. In particular, the Board agrees with and affirms the ALJ's findings that claimant is entitled to an award of compensation based upon a 25 percent permanent partial impairment to his right shoulder and a 12.5 percent permanent partial impairment to his left shoulder.

As noted by the ALJ, the record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should

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<sup>4</sup>See *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 593, 738 P.2d 445 (1987); *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000); *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001).

<sup>5</sup> See *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001)

claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 9, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Michael D. Streit, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge